

In an opinion of this department to your commission dated April 2, 1913, Report of the Attorney General for 1913, Volume 1, page 610, it was held that under the terms of these statutes, only the rolling stock of freight line companies is to be assessed for taxation by the Tax Commission; the other property being returned locally. Applying this rule, it follows that the thing to be determined by the Tax Commission is the proportion of the capital stock of the company representing rolling stock. After determining this proportion, then the Commission is to apportion that valuation to Ohio upon the basis of the proportion which the miles of railroad over which such company runs cars in Ohio bears to the entire number of miles in Ohio and elsewhere over which such company runs cars.

Specifically stated, your question is whether in determining the proportion of the capital stock of a freight line company, your Commission shall take into consideration all of the cars operated by the company or only cars owned by the company.

In the former opinion of this department above referred to, it is pointed out that the tax imposed by these sections is a property tax and that the use of the capital stock of the company is only a means of determining the value of the property.

I am advised by your department that as a matter of fact the cars which the freight line company in question leases from the railroad company are included in the report of the railroad company to the Commission for taxation and are a part of the aggregate value upon which the railroad company is assessed for taxation.

It might be argued that these leased cars represent some part of the capital of the freight line company and that in determining the proportion of the capital stock of the company representing rolling stock, the leased cars should be considered. Even so, it cannot be said that capital stock of the company to the full extent of the intrinsic value of these leased cars should be considered as capital stock of the company representing rolling stock, because the effect would be to tax the same property twice, once against the railroad company which owns them and also against the freight line company which operates them. It must always be borne in mind that it is the cars which are being taxed and not the capital stock.

Furthermore, I am unable to suggest any method of determining what the value of the lease of these cars would be even if the statute contemplated the inclusion of some value therefor.

While the statutes in question are indefinite and possibly susceptible of varying interpretations, I am forced to the conclusion that in determining the proportion of capital stock of the company which represents rolling stock, the Commission should take into consideration only cars owned by the company and not cars which it is operating under lease.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

3137.

POUNDAGE—PARTITION SALE—SHERIFF ENTITLED TO FEES UPON ALL PROCEEDS DESPITE PURCHASER'S RIGHT TO A RETURN OF HIS DISTRIBUTIVE SHARE.

**SYLLABUS:**

*In the sale of real estate, on order of the court in partition cases, the sheriff making such sale is entitled to poundage fees at the prescribed rate on all of the proceeds of such sale actually paid into his hands, irrespective of the fact that the purchaser bidding in and paying for said property is entitled to receive back from the sheriff a distributive share of the proceeds of said sale.*

COLUMBUS, OHIO, January 14, 1929.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your communication which reads as follows:

"We are in receipt of your opinion No. 2304 in reply to our request of June 22, 1928. We note that you understood from the Sheriff's letter which accompanied our request, that the court in the particular case had taxed costs for poundage in the sum of \$43.50, and therefore we could not question the action of the court. We of course had no intention of questioning the court's action and as a matter of fact did not know whether the judge had passed upon the question in his official capacity. What we are interested in knowing is the true construction of the law, and only accompanied our request with the Sheriff's letter to illustrate the kind of a case which raises the question.

The question is: What poundage may a sheriff legally charge and receive under the provisions of Section 2845, G. C., when the purchaser is entitled to a part of the proceeds of the sale of the property, when the whole sale price of the property is paid to the Sheriff and by him distributed in accordance with the order of the court?

May we have your opinion upon this question without regard to the particular case referred to in our former communication?"

Section 2845, General Code, referred to in your communication, was formerly Section 1230, Revised Statutes, and so far as pertinent to the consideration of the question presented in your communication, said section provided as follows:

"The fees and compensation of sheriffs shall be as follows: \* \* \* poundage on all moneys actually made and paid to the sheriff on execution, decree, or sale of real estate (except on writs for the sale of real estate in partition), one and a half per centum on the first thousand dollars, and one per centum on all sums over one thousand dollars; but when such real estate is bid off and purchased by a party entitled to a part of the proceeds, the sheriff shall not be entitled to any poundage except on the amount over and above the claims of such party: \* \* \* selling real estate under an order of court in partition, three-fourths of one per centum where the amount of sales does not exceed two thousand dollars, and one-fourth of one per centum on the amount over and above that sum."

Under the provisions of said section of the Revised Statutes above quoted the fees of the sheriff for selling real estate under order of the court in partition cases were not poundage at all, but were simply fees of the sheriff for his services in making such sales. *Ruggles vs. Bingham*, 14 O. N. P. (N. S.) 333. Moreover, under the provisions of said section relating to the sale of real estate under order of the court in partition cases, the right of the sheriff to the prescribed fees did not depend upon whether the proceeds of such sale actually came into his hands or not; and further, in such cases it appears that the fees that the sheriff was entitled to collect were not diminished by the fact that the real estate was bid in by an heir or devisee who was entitled to a distributive share of the proceeds of such sale.

As above noted, Section 1230, Revised Statutes, was carried into the General Code as Section 2845, which section of the General Code as amended by an act under date of May 31, 1911, and a later act under date of February 4, 1920, provides, so far as concerns the question here at hand, as follows:

Sec. 2845. "For the services hereinafter specified when rendered, the sheriff shall charge the following fees, and no more, which the court or clerk thereof shall tax in the bill of costs against the judgment debtor or those legally liable therefor: \* \* \* poundage on all moneys actually made and paid to the sheriff on execution, decree or sale of real estate, on the first ten thousand dollars, one per cent.; on all sums over ten thousand dollars, one-half of one per cent., but when such real estate is bid off and purchased by a party entitled to a part of the proceeds, the sheriff shall not be entitled to any poundage except on the amount over and above the claim of such party, except in writs of sale in partition he shall receive one per cent. on the first two thousand dollars, and one-third of one per cent. on all above that amount coming into his hands; \* \* \* "

Under the provisions of Section 2845, General Code, above quoted, it is quite clear that in sales of real estate by the sheriff on order of the court in partition cases he is now entitled only to fees by way of poundage on moneys actually paid into his hands, as in other cases of the sale of real estate on order of the court. *Ruggles vs. Bingham*, supra. However, the question here presented is whether or not in cases of sales by the sheriff of real estate on order of the court in partition cases he is entitled to fees by way of poundage on the whole of the proceeds of such sales paid into his hands where the property is bid in and paid for by an heir or devisee who is entitled as such to a distributive share of the proceeds of such sale. This question depends primarily upon the effect to be given to the exception contained in the statute to the general provisions therein contained with respect to the poundage fees which the sheriff is entitled to collect generally in the case of the sale of real estate on order of the court on execution, or like cases.

In the interpretation of the statutory provisions here involved, it is to be presumed that the Legislature did not intend by its enactment amending the provisions of Section 2845, General Code, to modify or change the prior law except in so far as it had therein declared such intention, either in express terms, or by clear and unmistakable implication. *Buckman vs. State*, *ex rel.* 81 O. S. 171, 177.

As above noted, effect is required to be given to the amendatory provisions of Section 2845, General Code, to the extent that it must now be held that in partition cases as in other cases the sheriff is only entitled to poundage fees on the proceeds of the sale of real estate actually paid into his hands.

The question here presented, as I see it, depends primarily on whether the exception relating to the sheriff's fees in partition cases, contained in the above quoted provisions of Section 2845, General Code, is an exception to the whole of the paragraph immediately preceding it relating to the poundage fees of the sheriff generally in cases of sales of real estate by him on order of the court, or whether the same is simply an exception to that part of the preceding paragraph relating to the rate of fees chargeable by the sheriff generally in cases of sale of real estate by him on order of the court on execution and other like cases. So far as recognized rules of statutory construction are concerned, we are required to hold that the exception in Section 2845, General Code, relating to the poundage fees of the sheriff in partition cases limits either the whole of the preceding paragraph or only that part of said paragraph which immediately precedes the exception. The part of said prior paragraph which immediately precedes the exception relating to the sheriff's fees in partition cases is that part which provides that when such real estate is bid off and purchased by a party entitled to a part of the proceeds, the sheriff shall not be entitled to any poundage except an amount over and above the claim of such party. An exception in a statute is a clause similar to a proviso, which excepts

from the operation of the statute persons, things or cases which would otherwise have been included in it. *Black on Interpretation of Laws*, page 427.

In the case of *Buckman vs. State, ex rel.*, supra, it was held that as a general rule, unless the contrary intention plainly appears, a proviso is to be construed with reference to the immediately preceding paragraph to which it is attached, and qualifies or limits only the part or paragraph to which it is appended. As above noted, the exception here under consideration relating to fees of the sheriff in partition cases is to be considered as limiting either the whole of the prior paragraph or that part thereof which immediately precedes the exception. In either view, said exception relating to the fees of the sheriff in partition cases is to be considered as providing for the sheriff's fees at the prescribed rates on all of the proceeds of such sales paid into his hands, irrespective of the fact that the person bidding in the property and paying for the same is entitled as an heir or devisee to a distributive share of such proceeds.

A contrary conclusion with respect to the effect of the exception relating to fees of the sheriff in partition cases can be arrived at only by holding that said exception does not relate back to the whole of the prior paragraph, or to that part thereof immediately preceding the exception, but relates back to that part of the prior paragraph which relates to the rate of fees on the sale of real estate on order of the court generally therein contained. I know of no rule of construction which permits this interpretation of the statute.

I am of the opinion, therefore, by way of specific answer to the question made in your communication that in the sale of real estate, on order of the court in partition cases, the sheriff making such sale is entitled to poundage fees at the prescribed rate on all of the proceeds of such sale actually paid into his hands, irrespective of the fact that the purchaser bidding in and paying for said property is entitled to receive back from the sheriff a distributive share of the proceeds of said sale.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

3138.

LEGAL COUNSEL—EMPLOYED TO ASSIST PROSECUTING ATTORNEY  
WITHOUT AUTHORITY OF COURT—NO RECOVERY OF FEES PAID  
BY COMMISSIONERS IN ABSENCE OF FRAUD OR COLLUSION.

**SYLLABUS:**

*Where an attorney is engaged to assist the prosecuting attorney in the trial of pending cases, upon request of the prosecuting attorney, which employment is known to the Court of Common Pleas in which said cases are tried, and through an inadvertence, the common pleas judge did not authorize said employment until after the services were rendered and after payment had been made therefor, in pursuance to a resolution of the board of county commissioners, under such circumstances, in the absence of fraud or collusion, said payments may not be recovered from said attorney.*

COLUMBUS, OHIO, January 14, 1929.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*